86-520

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY TERRELL,
Petitioner

v.

UNIVERSITY OF TEXAS SYSTEM POLICE, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Fifth Circuit Court of Appeals err, as a matter of fact and law, in displacing a trial court finding that the petitioner engaged in protected First Amendment activities?

2. Did the Fifth Circuit Court of Appeals apply the appropriate standard of review in displacing a jury finding of fact that the petitioner was terminated from his employment for his exercise of protected First Amendment activities?

3. Were the individual defendants entitled to qualified immunity from damages?

The parties to this proceeding are Gary Terrell, University of Texas System Police, C. L. Price and Frank I. Cornwall.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 30, 1986, and its order denying rehearing entered July 28, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 792 F.2d 1360, appears in the appendix, page A-1. The order of the Court of Appeals denying rehearing appears in the appendix, page A-8. The judgment of the United States District Court for the Southern District of Texas, not reported, appears in the appendix, page A-9.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was rendered and entered on June 30, 1986. The order denying rehearing was rendered and entered on July 28, 1986. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment I, appears in the appendix at page A-11.

U. S. Constitution, Amendment XIV, appears in the appendix at page A-11.

STATEMENT OF THE CASE

The petitioner, Gary Terrell, was terminated from his employment with the University of Texas System Police in June, 1981. At the time of the discharge, the reason asserted for such action by Terrell's immediate supervisor, respondent, Chief of Police, C. L. Price, was that Terrell was "keeping files" on Price. The "files" con-

sisted of a small shirt-pocket notebook which Terrell routinely carried with him for the purpose of recording information related to his work and personal matters.

In March, 1982, Terrell initiated suit pursuant to Title 42 U.S.C. § 1983 seeking redress for the denial of his rights guaranteed by the First and Fourteenth Amendments to the U. S. Constitution. Jurisdiction was conferred upon the District Court under Title 28 U.S.C. § 1343.

At trial of this case, Terrell was able to show that the accusation regarding the keeping of files on Chief Price was merely pretextual and that his discharge was, in fact, substantially motivated by his having repeatedly expressed concern to Chief Price regarding mismanagement, lack of efficiency, and the failure of the police department to properly protect the public. It was also determined at the trial of this case that Terrell would not have been terminated but for his expression of these concerns. Following the favorable verdict of the jury, Terrell requested that he be afforded declaratory and injunctive relief together with attorney's fees pursuant to Title 42 U.S.C. § 1988. The trial court refused Terrell's request for relief on the basis that the jury had found the individual defendants to have acted in good faith. Respondents conceded on appeal that the issue of good faith was improperly submitted to the jury. The Court of Appeals did not reach the issue of qualified immunity, concluding that Terrell's First Amendment claim failed as a matter of law. The Court of Appeals determined that Terrell's speech was not protected based upon an improper finding of fact and on a new legal test which focuses on an employee's status rather than on the substantive content of his speech.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' application of an improper standard of review in overruling the jury's factual finding of causation conflicts with applicable decisions of this Court.

This is a case wherein two trials have been conducted. The first trial was held in May, 1984, over a two-week period before a District Court and a jury. At this trial, the District Court determined that Terrell had spoken on three specific issues of "public concern" which were asserted by Terrell to be the reason for his discharge. These issues included Chief Price's policy of mandatory overtime, the need for supervisory training, and a need to conduct exit interviews with resigning officers to determine their reasons for leaving. A-14. The District Court instructed the jury that these matters were of public concern and, therefore, that speech related to these matters was protected by the First Amendment. The jury then determined that Terrell's speech on these issues was a substantial or motivating factor in the decision to terminate his employment. It further found that in the absence of his speech on these topics, Terrell would not have been terminated. A-15.

In May, 1986, a second trial was had in this case before a panel of the Fifth Circuit Court of Appeals. In this trial, the Court of Appeals, on its own initiative, determined, as an issue of fact, that Terrell was fired only because his "secret diary" fell into the hands of his supervisor. The Court of Appeals then found, as a matter of law, that none of the speech contained in Terrell's shirt-pocket notebook was of public concern.

The unsolicited substitute finding of fact inappropriately displaces a jury finding on the critical issue of causation and is based upon an inapropriate standard of review. Appellate scrutiny of factual determinations made by a jury is limited to review of the sufficiency of the evidence. *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108 (1963). As this Court stated in *Gallick*,

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (cites omitted.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Id., at 114-115, quoting *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29 at 35 (1944). A jury finding may only be overturned if there is no evidence to support the finding. Here, from a purely procedural standpoint, it is significant that the respondents did not file a cross-appeal challenging the jury's finding of causation. *United States v. Railway Express Co.*, 265 U.S. 425 (1924).

The Court of Appeals' finding that Terrell's speech was unprotected as a matter of law (which finding displaces that of the trial court) rests solely on the substituted factual finding on causation and is not supported by the record as a whole.

While a reviewing court looks to the record as a whole in reaching an independent judgment regarding whether the protection afforded by the First Amendment extends to a particular fact situation, the question of causation is purely a question of fact to be determined by the trier of fact. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). It is important to note that the District Court did not instruct the jury to consider whether the shirt-pocket notebook was a motivating factor in Terrell's discharge. A-14. The jury was clearly instructed that Terrell had communicated his concerns regarding three specific matters which were found by the District Court to be of public concern. The District Court did not limit the jury's consideration of causation to the notations in Terrell's shirt-pocket notebook. To the contrary, the jury was instructed to determine whether the substance of Terrell's speech (involving three specific issues admitted by Chief Price to have been discussed with Terrell on numerous occasions and documented in a variety of exhibits) was a substantial or motivating reason in the decision to terminate Terrell.

The Court of Appeals, however, determined that Terrell's shirt-pocket notebook constituted the sole cause in fact for Terrell's termination. To have so found, the Court of Appeals had to ignore the testimony of ten witnesses and over fifty exhibits, in favor of a single exhibit. This determination does not reflect an independent review of the record to determine the existence of protected First

Amendment activity. The Court of Appeals had to ignore evidence supporting the District Court's finding of specific areas of protected speech to displace the jury's determination of causation. Such a retrial of the issue of causation in the Court of Appeals is contrary to prior precedent of this Court. *Gallick,* supra.

Accordingly, petitioner would urge that the standard of review employed by the Court of Appeals was erroneous and requires a reversal in this case.

II. The adoption of a new First Amendment test, which rejects the substantive content of a public employee's speech as a relevant inquiry, conflicts with applicable decisions of this Court.

The Court of Appeals for the Fifth Circuit has developed a new test to determine whether a public employee's speech is protected by the First Amendment. The key element of this new test is unique in that the content of the speech is held to be "of little moment." A-6.

This Court has uniformly held that public employees do not relinquish their right to comment upon matters of public concern simply by virtue of their status as employees of the state. *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* supra; *Connick v. Myers,* 461 U.S. 138 (1983). To the contrary, it is that very status which gives their speech constitutional protection. Of course, the right of an employee to free expression is not unlimited and must be balanced against the interest of the public employer in promoting the efficiency of the public services it performs through its employees. *Connick, Id.,* at 142. To be pro-

tected, an employee's speech must also be fairly characterized as touching upon a matter of public concern. *Connick, Id.*, at 146. To determine whether a particular expression by an employee touches upon a matter of public concern, such expression must be viewed with regard to its content, form, and context. *Connick, Id.*, at 147-148. If an employee's speech is determined to be upon a matter of public concern, then the Court will balance the interest protected by an employee's fundamental right to free expression against the employer's competing interest in promoting efficiency in the public service it performs.

In the case before this Court, the Court of Appeals held that the content of an employee's speech is of little importance in determining whether that speech touches upon a matter of public concern. The Court of Appeals reasoned that "(b)ecause almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee." A-6. Thus, by negating the importance of the content of an employee's speech, the Court of Appeals has evolved a new test inquiring solely into the status of the speaker. This rather simple status test is stated as follows:

> ". . . our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee." A-6.

To implement this test, a court need only focus upon the context of an employee's speech to determine the status in which the particular expression was made. Under this new test, even the speech found by this Court in *Connick* to be protected as touching upon a matter of public

concern would not be subject to the *Pickering* balancing test. Since the content of Sheila Myers' concern regarding pressure to work in political campaigns would not be relevant, the Court would merely have had to determine that the questionnaire was circulated by Myers' "primarily" in her status as an employee.

As stated above, such a test ignores the legal principle that it is the very status of a public employee which gives rise to constitutional protection. It does not foreclose it.

The volume of post-*Connick* opinions in the Fifth Circuit Court of Appeals only serves to blur, and make less coherent, a test for liability. *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009 (5th Cir. 1984). There is a perceptible tendency by the Fifth Circuit Court of Appeals to foreclose relief under all but the most outrageous circumstances. *Day v. South Park I.S.D.,* 768 F.2d 696 (5th Cir. 1985), *cert. denied* ____U.S.____, 106 S. Ct. 883 (1986) (concerns only personal, not public); *McPherson v. Rankin,* 786 F.2d 1233 (5th Cir. 1986), (concern that the President be assassinated held to be clearly of public concern and protected).

The opinion below inappropriately expands the doctrine of public concern beyond the content of speech.

This doctrine should be narrowly construed by the Court since free speech is a fundamental right. The right to free expression may be overcome by government only where a compelling state interest, on balance, outweighs the societal interest in protecting an individual's right to speak. No such showing is made here.

It must also be remembered that the entire public concern doctrine is an exception to a general rule that

the speech of a public employee is protected. The Fifth Circuit Court of Appeals' construction of *Connick* makes the exception the rule and then confines the exception to a litmus test of status. Under this test, First Amendment protection is precluded by virtue of the very status which must be established to gain access to the Court in the first instance.

Accordingly, petitioner would urge that the Court of Appeals has misapplied prior rulings of this Court which requires reversal of this case.

III. The District Court's submission of qualified immunity was in direct conflict with prior decisions of this Court and qualified immunity should have been denied as a matter of law.

As the number of claims for vindication of constitutional rights began to swell, courts sought to carve out certain protections shielding governmental officials exercising discretionary functions from the imposition of monetary damages. The concept of qualified or "good faith" immunity has traditionally offered such protection. *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In *Scheuer,* supra, a case arising out of the killing of three students at Kent State University, this Court determined that the governor of Ohio and various other governmental officials were not absolutely immune for their executive acts, but rather were entitled to claim a qualified immunity based upon a showing of "good faith." The Court held that:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive

> officers for acts performed in the course of official conduct."

Id., at 247-248.

The Court focused upon the function of the official's particular office to determine the reasonableness of the official's act.

As a means of clarifying the practical application of the doctrine of qualified immunity, the Court developed a two-prong test. *Wood v. Strickland,* 420 U.S. 308 (1975). This case involved a suit against school officials over the expulsion of high school students. The Court developed a bifurcated approach emphasizing both an objective and a subjective standard for determining the propriety of applying the qualified immunity doctrine.

The Court stated that:

> ". . . the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives than by the presence of actual malice."

Id., at 321.

With this pronouncement, the two-tiered test was adopted, and in general application, sought the answer to the following questions:

1. Did the official know, or should he have reasonably known, that his actions would violate the constitutional rights of the person affected?

2. Were the official's actions taken with the malicious intention to cause a deprivation of constitutional right or other injury?

Since each tier of this test was independently considered, the official only had to prevail on one to be clothed with the protection afforded by qualified immunity. Thus, *Wood,* supra, shifted the focus from the nature of the function of the official's office to what the official knew or should have known, and, also, to an additional focus on subjective intent.

The subjective element of this test was then abandoned by this Court. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

In analyzing the inherent pitfalls occasioned by inquiring into the subjective intent of a government official, the Court repudiated the subjective prong of the *Wood* test in favor of a single objective standard. In announcing this new approach to qualified immunity determinations, the Court restated the objective standard in the following manner:

> ". . . government officials performing discretionary functions generally are shielded from liability for civil damages insofar as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (cites omitted.)

Id. at 818.

Ignorance of the law is never a defense and a defendant is charged with knowledge of the law. Thus, a trial court is limited to a determination as to whether the law with respect to the conduct in question was settled at the time.

The state of the law at a particular time is not within the competency of a jury.

In the instant case, the respondents affirmatively pled that they were entitled to a grant of qualified immunity predicated upon "good faith." Terrell agreed that this defense was properly raised. However, the manner in which it was asserted and applied by the trial court was fundamentally improper. Qualified immunity is an affirmative defense and the burden was on the defendants to establish their right to the defense. *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984), *cert. denied* ____U.S.____, 105 S. Ct. 3476 (1985).

On Terrell's First Amendment claim, the District Court should have determined that respondents were not entitled to a grant of qualified immunity if the decision to terminate Terrell's employment was motivated by his exercise of protected activity. The factual finding of the jury regarding causation disposed of any claim to qualified immunity.

Accordingly, the Court of Appeals' failure to reverse in favor of petitioner on the issue of qualified immunity is erroneous.

CONCLUSION

This Court should grant certiorari to review the Fifth Circuit's opinion in the above case.

DATED: September _____, 1986.

Respectfully submitted,

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Gary TERRELL,
Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS SYSTEM POLICE, et al.,
Defendants-Appellees.

No. 84-2546.

United States Court of Appeals,
Fifth Circuit.

June 30, 1986.

Terminated employee of state unversity police system sued, arguing that discharge violated free speech and due process rights. The United States District Court for the Southern District of Texas, Woodrow B. Seals, J., rendered judgment for defendants, and former employee appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that if employee "spoke" in secret diary, which was critical of supervisor and which fell into supervisor's hands, the employee spoke it all only in a status as employee and not as a citizen and was not insulated by First Amendment from being fired for keeping the diary.

Affirmed.

Richard D. Strahan, George M. Kirk, Jr., Houston, Tex., for plaintiff-appellant.

Joseph W. Barbisch, Jr., Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before WILLIAMS, JOLLY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Gary Terrell, a public employee, was fired when his secret diary, which was critical of his supervisor, fell into the supervisor's hands. We hold that Terrell, if he "spoke" in the diary at all, spoke only as an employee and not as a citizen. Under *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983), he was not engaged in speech "upon matters of public concern" and was therefore not insulated by the first amendment from being fired for keeping the diary.

I

In response to an anonymous complaint that appeared to come from an unhappy employee, the Director of Police for the University of Texas System conducted an investigation of the University's Houston Department in January 1981. The gist of the anonymous complaint was that Charles Price, the Houston Chief of University Police, did not have adequate control over a group of supervisors headed by Captain Gary Terrell and that these supervisors were guilty of harassment and favoritism in their relations with lower-level employees. On February 2, the Director filed a report concluding that there were serious manage-

ment problems and indicating that the allegations in the anonymous complaint appeared to be true. Chief Price was given six months to cure the deficiencies and was told to file monthly status reports with the Director's office. In the wake of these minatory events, Chief Price relieved Captain Terrell of his patrol duties, assigned him to an office near the Chief's own office, and directed him to revise the department's policy and procedures manual.

On June 9, Chief Price received an anonymous letter accompanied by photocopies of pages from a small spiral-bound notepad. The notes, which were in Terrell's handwriting, showed that the author had been scrutinizing the chief's job performance; indeed, many of the incidents recorded in the notepad reflected unfavorably on Price. On June 25, Chief Price called Terrell into his office to discuss a number of problems. In the course of the discussion, the chief asked Terrell whether he had been keeping files on him. Terrell denied it, and the chief said that he didn't feel he could trust him. Price asked for Terrell's resignation, Terrell refused, and the chief fired him. A few days later, according to one witness, Terrell was offered a hearing, but he replied "that that wouldn't be necessary; that he wasn't interested in our kangaroo courts . . . and he would see us in court, a real court."

True to his word, Terrell filed suit in federal court against the University of Texas System Police, the Houston Department, the Director of the System Police, and Chief Price. Terrell alleged that his discharge violated his free speech and due process rights under the first and fourteenth amendments; he asked for declaratory and injunctive relief as well as damages. After the usual procedural maneuvering, the case was tried to a jury.

Responding to detailed special interrogatories, the jury found for the defendants on all issues except one. After being instructed that three matters dealt with in the photocopied notepad (Chief Price's policy of mandatory overtime; the need for supervisory training; and the need to conduct exit interviews with employees who resigned) were issues of "public concern" protected by the first amendment, the jury determined that Terrell's exercise of protected first amendment rights was a substantial or motivating factor in the decision to terminate him.

The jury determined that Terrell had suffered no damages, and the district court declined to award declaratory or injunctive relief. Judgment was entered for the defendants, and Terrell appeals.

II

[1-3] Although Terrell raises three issues on appeal, only one of them requires extended discussion.[1] He contends that the trial court erred in failing to use the jury's single finding in his favor—that he was terminated because of his first amendment activities—as the basis for an award of declaratory and injunctive relief. The defendants respond that the trial court misinterpreted

1. Terrell raises a qualified immunity issue that disappears in the light of our holding on the first amendment question. He also contends that the jury should not have believed the witness who testified that Terrell declined an offer of a post-termination hearing. The witness's testimony was sufficient to support a finding that Terrell waived whatever due process right he might have had to a hearing. *See Davis v. Vandiver,* 494 F.2d 830, 832 (5th Cir. 1974) (post-termination hearing is sufficient to satisfy due process requirements); *Bueno v. City of Donna,* 714 F.2d 484, 492-93 (5th Cir. 1983) (waiver may be found where a person knowingly fails to take advantage of an actually existing opportunity for a hearing). The record does not show that the witness was lying, and this court does not review credibility choices made by juries.

Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983), and that it was error to instruct the jury that the comments in the notepad were addressed to matters of "public concern" for purposes of the appropriate first amendment analysis.[2] We agree with the defendants, and we accordingly affirm the judgment of the district court.[3]

[4, 5] Assuming, without deciding, that an employee's personal notebook or diary can be considered first amendment "speech" even though the contents come to light completely without the employee's knowledge or consent, we hold that Terrell's constitutional claim is barred by *Connick v. Myers.* In *Connick,* the Supreme Court held "that when a public employee speaks not *as a citizen* upon matters of public concern, but instead *as an employee* upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 103 S. Ct. at 1690 (emphasis added) (citation omitted). In determining whether a particular speech or writing addressed "a matter of public concern," we must decide whether the plaintiff was "deprived of fundamental rights by

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2. Whether Terrell's speech was addressed to a matter of "public concern" is a legal question that the trial judge properly removed from the jury's consideration. On appeal, we make an independent review of the whole record in order to determine whether the district court properly resolved the question. *See Connick.* 103 S. Ct. at 1690 & n. 7, 1692 n. 10. *Cf. McPherson v. Rankin,* 786 F.2d 1233, 1237 (5th Cir. 1986).

3. When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below. *O'Malley v. United States Fidelity & Guaranty Co.,* 776 F.2d 494, 499 n. 1 (5th Cir. 1985).

virtue of working for the government."[4] Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as citizen or primarily in his role as employee.[5] In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.[6]

In the light of these principles, it is plain that Gary Terrell's personal notebook cannot serve as the basis for a claim that he was fired for exercising his first amendment rights. He made no effort to communicate the contents of the notebook to the public, and the evidence does not suggest that he would have had any occasion to do so. The notes in question were made at a time when the Houston Department was already under investigation by the Director of the University System Police. That investigation, which was undertaken without any intervention from outside the government, had already suggested that Terrell himself was a leading cause of serious prob-

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4. *Connick*, 103 S. Ct. at 1690; *see also id.* (Constitution "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.").

5. *See id.* at 1691 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.").

6. *See id.* at 1691 n. 8 (a writing "not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.").

lems in the Houston Department. To whatever extent Terrell's notes suggested either that Chief Price had been guilty of mistakes or that Terrell was contemplating revelations that would be embarrassing to his supervisor, such suggestions were a wholly intragovernmental concern at the time Terrell was fired.[7] The conclusion is inescapable: Terrell was not terminated for speaking "as a citizen upon matters of public concern." *Connick,* 103 S. Ct. at 1690, or for "speak[ing] out as a citizen on a matter of general concern, *not tied to a personal employment dispute," id.* at 1691 n. 8 (emphasis added).

The judgment of the district court is AFFIRMED.

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7. This lawsuit did not call for a determination of whether Terrell deserved to be fired or whether Chief Price terminated him for self-serving purposes. The only question is whether Terrell's constitutional rights were violated.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2546

GARY TERRELL,
Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS SYSTEM POLICE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(July 28, 1986)

Before WILLIAMS, JOLLY and HIGGINBOTHAM, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ PATRICK HIGGINBOTHAM
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-82-0654

GARY TERRELL,
Plaintiff,

v.

THE UNIVERSITY OF TEXAS
SYSTEM POLICE, ET AL.,
Defendants.

ORDER

Presently pending before the Court is Plaintiff's Motion for Entry of Judgment Consistent with the Jury Verdict. Also pending is Defendants' oral motion for entry of judgment made in open court at the conclusion of trial.

This action as originally filed alleged unlawful termination of employment in violation of the first and fourteenth amendments to the United States Constitution. On April 19, 1983, Judge Bue of this Court dismissed all claims for monetary damages against Defendant University of Texas System Police and Defendant C. L. Price acting in his official capacity. *Edelemen v. Jordan,* 415 U.S. 651 (1979); *United Carolina Bank v. Board of Regents,* 665 F.2d 553 (5th Cir. 1982). The Court left intact claims for declaratory and prospective injunctive relief, together with those claims for monetary relief as against Defendant C. L. Price in his individual capacity. On August 5, 1983, the Court granted Plaintiff's motion to add Defendant Frank Cornwall as a party

defendant. An eight-day jury trial was commenced on May 14, 1984. The jury returned its special interrogatories in favor of all Defendants on May 24, 1983.

The Court has carefully reviewed Plaintiff's motion, together with the brief submitted in support thereof and the record of this action as a whole. There is no inconsistency in the special interrogatories returned by the jury. Plaintiff has been accorded a full and fair opportunity to fully develop all the issues and has failed to prevail upon the merits. *Cf. Coen v. Harrison County Sch. Bd.*, 658 F.2d 24 (5th Cir. 1981), *cert. denied,* 455 U.S. 938 (1982); 42 U.S.C. § 1988. The evidence adduced during the course of this action is insufficient to justify the award of declaratory or injunctive relief to Plaintiff.

Accordingly, the issues of this action having been duly tried to a jury, and the jury having rendered its verdict, the Court hereby ORDERS:

That Plaintiff recover nothing against Defendants; and,

That Plaintiff's Motion for Entry of Judgment Consistent with the Jury Verdict is in all respects DENIED.

All costs in this action are taxed against Plaintiff.

This is a FINAL JUDGMENT.

The Clerk shall file this Order and provide true copies to all parties.

Done at Houston, Texas, this 14th day of September 1984.

/s/ WOODROW SEALS
United States District Judge

U. S. CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TITLE 42 U.S.C.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

DISTRICT COURT'S INSTRUCTION ON PROTECTED ACTIVITY

MEMBERS OF THE JURY:

I now instruct you that as a matter of law, certain activities or concerns of the Plaintiff were of public concern and therefore protected by the First Amendment.

The Plaintiff communicated certain criticisms and concerns relating to Chief Price's performance. Among these criticisms and concerns were the following:

(a) Chief Price's policy of mandatory overtime;

(b) the need for supervisory training; and,

(c) the need to conduct exit interviews to determine why good officers were leaving.

You are instructed that these issues are of public concern and are protected.

The answer to Special Interrogatory No. 5 is "Yes" as a matter of law.

Proceed to Special Interrogatory Nos. 6 & 7. This instruction to you should in no way be interpreted as an indication of what your answers should be to any other interrogatory before you.

/s/ WOODROW SEALS
11:50 a.m.
May 25, 1984

JURY VERDICT ON FIRST AMENDMENT ISSUE

SPECIAL INTERROGATORY NO. 5

Do you find by a preponderance of the evidence that the Plaintiff engaged in any activities which involved matters of public concern?

ANSWER YES OR NO: Yes

If you have answered "no" to Special Interrogatory No. 5, skip Special Interrogatory Nos. 6 and 7, and proceed to Special Interrogatory No. 8.

SPECIAL INTERROGATORY NO. 6

Do you find by a preponderance of the evidence that the Plaintiff's exercise of protected First Amendment activities was a substantial or motivating factor in the decision of the Defendants, or any of them, to terminate Plaintiff's employment with the University of Texas Police at Houston?

ANSWER YES OR NO: Yes

SPECIAL INTERROGATORY NO. 7

Do you find by a preponderance of the evidence that the decision to terminate Gary Terrell's employment with the University of Texas Police at Houston would have been made even if he had not been engaged in activities protected by the First Amendment?

ANSWER YES OR NO: No

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-520

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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GARY TERRELL,

Petitioner

V.

UNIVERSITY OF TEXAS SYSTEM POLICE, ET AL,

Respondents

* * * * * * * * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit erred in affirming the trial court's taking nothing judgment.

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NO. 86-520

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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GARY TERRELL,

Petitioner

V.

UNIVERSITY OF TEXAS SYSTEM POLICE, ET AL,

Respondents

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * *

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * *

STATEMENT OF THE CASE

Petitioner was a peace officer employed by the University of Texas System Police at Houston, Texas. In late 1980, Charlie Price, Chief of the University of Texas System Police at Houston, received an anonymous complaint which complained among other things of uneven discipline by Petitioner of his subordinates. This complaint resulted in an internal investigation. As the result of the investigation Petitioner was relieved of his responsibilities as a captain and reassigned to other duties. Later, on June 9, 1981, Chief Price received an anonymous letter containing photocopies of pages from a small notepad in Petitioner's handwriting. Chief Price asked Petitioner whether he had been keeping files on Chief Price. Petitioner denied keeping files. After stating to Petitioner that he could not trust him, Chief Price asked for Petitioner's resignation, and, when Petitioner refused to resign Chief Price fired him. A few days after his termination, Petitioner refused an

offered due process hearing stating "that that wouldn't be necessary; that he wasn't interested in our kangaroo courts . . . and that he would see us in court, a real court."

Petitioner filed suit against the University of Texas System Police and Chief Price in his official capacity. The trial court dismissed these claims as barred by the Eleventh Amendment. Petitioner's amended complaint against Chief Price and Frank Cornwall individually was heard before a jury in May of 1984. The jury was instructed that Petitioner's criticisms of Chief Price concerning (1) Chief Price's policy of mandatory overtime; (2) the need for supervisory training; and, (3) the need to conduct exit interviews to determine why good officers were leaving, were matters of public concern protected by the First Amendment.

The jury then answered special interrogatories for defendants on all issues except those involving Petitioner's First Amendment claims. On the basis of these findings (among which was that Petitioner had suffered no damages) the court entered its judgment that Petitioner take nothing.

Petitioner asserts on Petition for Writ of Certiorari that the Court of Appeals for the Fifth Circuit erred in affirming the trial court's judgment that Petitioner take nothing, and that he was at least entitled to declaratory or injunctive relief on the basis of his First Amendment claims.

SUMMARY OF ARGUMENT

The Court of Appeals did not err in affirming the trial Court's take nothing judgment. The Court of Appeals may affirm upon any basis reflected in the record. The Court of Appeals found that the three criticisms of Chief Price were not matters of public concern.

ARGUMENT

Petitioner asserts that ". . . the District Court determined that Terrell had spoken on three specific issues of 'public concern' which were asserted by Terrell to be the reason for his discharge. These issues included Chief Price's policy of man-

datory overtime, the need for supervisory training, and a need to conduct exit interviews with resigning officers to determine their reasons for leaving." (Petition for Writ of Certiorari, p.4) The district court's determination concerning whether or not speech was on a matter of public concern was properly a legal determination. *Connick v. Meyers,* 461 U.S. 138, 148 n.7 (1983). The trial court initially instructed the jury that the three matters of concern expressed by Petitioner were matters of public concern. (Petition for Writ of Certiorari, A-14). It is unclear whether the trial court ultimately withdrew this purely legal question from the jury in ruling that Plaintiff take nothing. The Court of Appeals for the Fifth Circuit, exercising its *plenary* review of this legal determination, and after reviewing the record as a whole, found that the three matters "expressed" in the context of the present case are *not* matters of public concern. On the basis of this finding, the Court of Appeals affirmed the trial court's denial of relief.

There is no particularly novel position of law advanced in the Appellate Court's affirmance of the trial court upon *any* basis which appears on the record to support the trial court's Judgment that plaintiff take nothing. (Trial Court Judgment, Petition for Certiorari, A-9-10). *Brown v. Allen,* 344 U.S. 443, 459 (1963); *Helvering v. Gowan,* 302 U.S. 238 (1937); *DeSanchez v. Banco Central DeNicaragua,* 770 F.2d 1385, 1387 (5th Cir. 1985); *Clayton v. Orleans Parish School Bd,* 649 F.2d 1084, 1094, n.12 (5th Cir. 1981); *Devine v. Commissioner of Internal Revenue,* 558 F.2d 807 (5th Cir. 1977).

The holding by the Court of Appeals in the present case, that "speech" directed at (1) Chief Price's policy of mandatory overtime (2) the need for supervisory training and (3) the need to conduct exit interviews to determine why good officers were leaving was not on a matter of public concern, is not in conflict with this court's ruling in *Connick v. Meyers,* supra. The matters involved in *Connick* concerned (1) office transfer policy, (2) office morale, (3) the need for a grievance committee, (4) the level of confidence in supervisors, and (5) whether employees felt pressured to work in political campaigns. 461 U.S. at 142. All but the latter [No.5] were deemed to be matters *not* of public concern. The first four survey questions dealt with in *Connick* do not differ significantly from the three matters presented in

the present case. All deal with matters complained of by Petitioner as an employee concerning employment.

Although an argument could be made that each concern could be *stretched* into a matter of public concern, this court in *Connick* chose not to do so and ruled that no First Amendment issue was presented by the first four survey questions. A similar conclusion was reached by the Court of Appeals in the present case. Respondents assert that the Court of Appeals was correct in finding that the three matters "expressed" in the present case were not of "public concern," and that the Court of Appeals was correct in affirming the trial court's judgment that Plaintiff take nothing.

PRAYER

Respondents pray that Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney General of Texas

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Attorney General

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Chief, State & County Affairs

James C Todd

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, return receipt requested, as of the 23 day of December, 1986, to:

George M. Kirk, Jr.
Richard D. Strahan
Strahan & Kirk, Incorporated Attorneys
3223 Smith Street, Suite 224
Houston, TX 77006

JOSEPH W. BARBISCH, JR.